89-1686

No. _____

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In The

# Supreme Court of the United States

February Term, 1990

CAROL A. MONTENEGRO,

*Petitioner,*

vs.

STATE OF ARIZONA DEPARTMENT OF ECONOMIC SECURITY, ET AL.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

PAUL MENKVELD
Attorney at Law
200 Transamerica Bldg.
177 N. Church Avenue
Tucson, Arizona 85701
(602) 628-7777
*Attorney for Petitioner*

Associate Counsel
ALBERT R. GAMBLE
Attorney at Law
177 N. Church Avenue
Tucson, Arizona 85701

Date of Mailing: January 26, 1990

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether Arizona's Juvenile Dependency statutes, both as enacted and applied by the Court below, violate the Fourteenth Amendment by:

(a) subjecting the fundamental custodial rights of parents to abrogation by the State under application of procedural rules and standards especially designed to facilitate the convenient public administration of juvenile justice, which unreasonably subordinates in the process, protection of the parent's highly valued interest in the custody, care, consortium, management, and upbringing of their children.

(b) failing to affirm, as a fundamental nondiscretionary presumption posited upon constitutional and traditional principles, that placement of a child with his or her parent inherently subserves and fosters the child's best interest and welfare, such status to remain inviolable to state interference absent clear and convincing proof of a parent's unfitness to manage and rear his or her child.

2. Whether the decision of the Court below is reconcilable with the constitutional right of a parent otherwise fit, willing, and desirous of rearing his or her minor child, to have the custody and management of such child, vis-a-vis the statutory power of the State to divest the parent thereof.

3. Whether Arizona's "best interest of the child" prescription, as interpreted and applied by the Arizona courts, adequately channels, the trial court's discretion to determine such condition contrarily to the constitutionally protected custodial right of an otherwise fit and willing parent?

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

The Petitioner, Carol Ann Montenegro, respectfully prays that a Writ of Certiorari issue to review that judgment and opinion of the Supreme Court of Arizona entered on November 1, 1989.

## OPINION BELOW

The judgment of the Arizona Supreme Court is attached as Appendix "A" to this petition.

## JURISDICTION

The judgment of the Supreme Court was entered on November 1, 1989. No motion for reconsideration was submitted by the petitioner. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*U.S. Const. Amend. XIV:*

*Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*A.R.S. Section 8-201: Definitions*

2. "Abuse" means the infliction or allowing of physical injury, impairment of bodily function or disfigurement or the infliction of or allowing another person to cause serious emotional damage as evidenced by severe anxiety, depression, withdrawal or untoward aggressive, behavior and which emotional damage is diagnosed by a medical doctor or psychologist pursuant to Section 8-223 and which is caused by the acts or omissions of an individual having the care and custody of a child. Abuse shall include inflicting or allowing sexual abuse pursuant to Section 13-1404, sexual contact with a minor pursuant to Section 13-1405, sexual assault pursuant to Section 13-1406, molestation of a child pursuant to Section 13-1410, commercial sexual exploitation of a minor pursuant to Section 13-3552, incest pursuant to Section 13-3608 or child prostitution pursuant to Section 13-3213.

6. "Child", "youth" or "juvenile" means an individual who is under the age of eighteen years.

7. "Custodian" means a person, other than a parent or legal guardian; who stands in loco parentus to the child or a person to whom legal custody of the child has been given by order of the Juvenile Court.

11. (a) "Dependent child" means a child who is adjudicated to be:

> (a) in need of proper and effective parental care and control and has no parent or guardian, or one who has no parent or guardian willing to exercise or capable of exercising such care and control.

(b) destitute or who is not provided with the necessities of life, including adequate food, clothing, shelter or medical care, or whose home is unfit for him by reason of abuse, neglect, cruelty or depravity by either of his parents, his guardian, or other person having his custody and care.

14. "Juvenile Court" means that Juvenile Division of the Superior Court when exercising its jurisdiction over children in any proceeding relating to delinquency, dependency or incorrigibility.

18. "Protective supervision" means supervision ordered by the Juvenile Court of children found to be dependent or incorrigible.

19. "Shelter care" means the temporary care of a child in any public or private facility or home licensed by this state offering a physically nonsecure environment, which is characterized by the absence of physically restricting construction or hardware and provides the child access to the surrounding community.

*A.R.S. Section 8-221: Commencement of Proceedings.*

A. Proceedings under this chapter may be commenced by one of the following procedures:

1. By transfer of a case from another court as provided in Section 8-222.

2. By the filing of a petition in accordance with the rules of Procedure of the Juvenile Court.

*A.R.S. Section 8-223: Taking Into Temporary Custody:*

B. A child may be taken into temporary custody:

2. By a peace officer or a child protective services specialist or the state department of economic security if temporary custody the child because the child is either:

(a) suffering or will imminently suffer abuse.

(b) suffering serious physical or emotional damage which can only be diagnosed by a medical doctor or psychologist.

*A.R.S. Section 8-241: Disposition and Commitment.*

After receiving and considering the evidence on the proper disposition of the case, the court may enter judgment as follows:

1. It may award a dependent child:

(a) To the care of its parents, subject to the supervision of the state department of economic security.

(b) To a suitable institution.

(c) To an association willing to receive him.

(d) To a reputable citizen of good moral character.

(e) To an appropriate public or private agency licensed to care for children.

(f) To a suitable school.

(g) To maternal or paternal relatives, as guardian of the person, provided they are physically and financially able to provide proper care.

(h) To the protective supervision of a probation department subject to such conditions as the court may impose.

(i) To supervision under the independent living program established pursuant to 8-521.

*A.R.S. Section 8-244: Investigation Of Alleged Acts Of . . . dependency . . .*

B. A child protective services specialist of the state department of economic security shall have the responsibility for the complete investigation of all complaints of alleged dependency. The state department shall be responsible for the disposition of such child unless the matter requires the intervention of the court.

*A.R.S. Section 8-246: Jurisdiction; Length of Commitment; Placement.*

A. When jurisdiction has been acquired by the juvenile court of a child, the child shall continue under the jurisdiction of the juvenile court until such child becomes eighteen years of age, unless sooner discharged pursuant to law . . .

B. The awarding of a child shall not extend beyond the eighteenth birthday of the child . . .

*A.R.S. Section 8-546. Definition; Exemption.*

5. "Protective services" means a program of identifiable and specialized child welfare which seeks to prevent dependency, abuse and exploitation of children by reaching out with social services to stabilize family life, and to preserve the family unit by focusing on families where unresolved problems have produced visible signs of dependency or abuse and the home situation presents actual and potential hazards

to the physical or emotional well-being of children. The program shall seek to strengthen parental capacity and ability to provide good child care.

## STATEMENT OF THE CASE

On October 31, 1988, a judgment was entered by the Juvenile Division of the Superior Court of Arizona, denying petitioner's application for the physical custody of her five year old daughter previously adjudged dependent by the Court. (See Appendix C) At trial, the petitioner presented essentially undisputed medical evidence showing her recovery from the transient mental illness that had provided the respondent's basis for the dependency petition, insofar as it applied to petitioner, natural mother of the subject child. Petitioner's essentially unrefuted evidence consisted of the testimony of both lay and professional witnesses. The respondent's opposition, and that of the natural father, petitioner's former husband, were confined, mainly, to cross examination of petitioner's medical witnesses. Petitioner's principal witness was her treating physician, a psychiatrist, who testified that petitioner's mental illness had been brought on, for the most part, by the marital conflicts that led to her eventual divorcement from the child's father. Both the psychiatrist and petitioner's therapy psychologist testified that petitioner was well able to resume the care, custody and management of her child from whom she had been separated since the break-up of her marital home some several months preceding. (See Appendix F, pp. 3-6) The Father, who had been judicially awarded

temporary custody of the child in consequence of the mother's onset of emotional illness and resultant hospitalization, had been divested thereof by the respondent, Arizona Department of Economic Security, in pursuance of reports that he, the natural father, was sexually molesting the minor. Pursuant to stipulation, neither parent contested the dependency petition filed by the Arizona Department of Economic Security which was thereupon granted by the Juvenile Division of the Arizona Superior Court.

Petitioner's timely appeal from the Juvenile Court's order denying her subsequent application for custody of her child was denied by the Arizona Supreme Court. Petitioner thereafter petitioned the Arizona Court of Appeals for relief by Special Action. (See Appendix "E") After consideration the Court of Appeals declined to take jurisdiction of petitioner's Special Action Petition. (See Appendix "B")

Petitioner's timely Petition For Review of the appellate court's declination, addressed to the Arizona Supreme Court, was denied by the latter tribunal without opinion. (See Appendix "A")

## HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The federal issues that petitioner raises in this petition concerns fundamental constitutional rights mandated by the Fourteenth Amendment to the United States Constitution. All of the issues concerning the denial of due process were presented to the Arizona Supreme Court in petitioner's Petition For Review of the Appellate

Court's refusal to take jurisdiction of her Special Action challenging the Superior Court's judgment. (See Appendix "D", pp. 4 and Appendix "E", p. 7) In its order of November 1, 1989, published without opinion, the Arizona Court rejected those federal constitutional claims and affirmed the lower court's judgment. Petitioner declined to move for reconsideration due to her concern for the harmful effects of lapsing time upon her parent-child relationship and anxiousness to proceed as swiftly as possible to a final adjudication of her custodial claim.

## REASONS FOR GRANTING THE WRIT

This case presents extraordinary circumstances to the extent of its focus upon unprecedented state and national trepidation over the growing propensity of the state to manipulate the traditional constitutional rights of parents to have the custody and upbringing of their children. It calls into question the fundamental fairness of subjecting the custodial rights of parents to abrogation by the state under application of judicial standards and procedures at critical variance with those applicable to the litigation of adult matters of vital importance under general law and makes timely issue of Arizona's Rule respecting the standard of proof as such affects parental rights in dependency proceedings. Review by this court is warranted for the foregoing reasons.

**1. The rules, standards and procedures of Arizona law especially promulated to facilitate the convenient administration of juvenile justice are repugnant to due process and fundamental fairness strictures of U.S. Const. Amend. XIV, insofar as that amendment's protections apply to the rights of the parents of juveniles who become amenable to enforcement of such statutes.**

It can hardly appear other than academic that Arizona's Rules of Procedure in juvenile cases establishing the informal hearing format, Rule 16, and preponderance of the evidence standard in dependency proceedings, Rule 17, while facilitating expeditious adjudication of Child Protection Services petitions seeking the temporary or permanent displacement of parental custody, reduces the fundamental parenting rights of parents to a valuation status substantially inferior to that accorded the state's "best interest of the child" objective. The Rule's elimination of a jury trial denies the aggrieved parent the benefit of fact-finding by that most revered of all institutions of American justice in a court contest involving "an interest far more precious than any property right." *Santosky v. Kramer*, 102 S. Ct. 1388, 455 U.S. 745, 71 L. Ed. 2d, 599.

**2. The "Preponderance of the Evidence" standard for determining parental custodial unfitness independency hearings under Arizona law is repugnant to the due process prescription of the Fourteenth Amendment.**

Arizona's holding that "preponderance of evidence standard is proper standard of proof in dependency proceeding" *Matter of Appeal in Cochise County Juvenile Action No. 5666-J* (1982), 133 Ariz. 157, 650 P. 2d 459, and that "Burden of proof in dependency adjudication is merely

preponderance of the evidence". *In re Pima County Juvenile Action No. J-31853* (1972), 18 Ariz. App. 219, 536 P. 2d 197, poses the same "due process" and "fundamental fairness" problem respecting the parents' fundamental right to custody of his or her child, that occupied this court in *Santosky v. Kramer,* wherein it declared the inappropriateness of the "mere preponderance of the evidence" standard in determining parental unfitness to have custody of their children. *Santosky v. Kramer,* Ibid. And since it can hardly be disputed but that the parental custodial right at risk in a "dependency" proceeding differs but slightly in degree from that jeopardized by a "severance" application brought by the state – the devastation of the divested parent being virtually equal in either instance – it must abundantly appear that the "clear and convincing" standard mandated by the Santosky decision should apply to dependency proceedings as well.

**3. The decision of the court below denying petitioner's application for custody of her minor daughter, conflicts directly with Arizona case law defining and upholding the parent's right to custody.**

Both federal and state due process and equal protection guarantees were patently disregarded by the juvenile court's denial of petitioner's application for the custody of her child which was supported by sufficient proof of petitioner's fitness therefor. (Appendix "F", pp. 3-6) The "gravest reason" for divesting the parent was nowhere shown by the respondent in accordance with the repeatedly affirmed directive of the Arizona court in similar

dependency proceedings. *In Re Pima County Juvenile Action J-31853*, 18 Ariz. App. 219, 50 P. 2d 395; *Matter of Appeal in Cochise County Juvenile Action No. 5666-J*, 133 Ariz. 147, 650 P. 2d 459; *Matter of Appeal in Maricopa County Juvenile Action No. JS-5209 and JS No. 4963*, 143 Ariz. 178, 692 P. 2d 1027; *Matter of Maricopa County Juvenile Action No. JD 561*, 131 Ariz. 25, 638 P. 2d 692; *Anguis v. Superior Court In and For Maricopa County*, 6 Ariz. App. 68, 492 P. 2d 760; *Arizona Dept. of Public Welfare v. Barlow*, 80 Ariz. 249.

This Court has itself recognized and affirmed the fundamental substantiality and constitutional protection of such parental right. *Santosky v. Kramer*, Id., and strongly implied the priority of such right over the "best interest of the child" doctrine in cases involving parents versus other persons or entities. *Skeadas v. Sklaroff*, 84 R I 206, 122 A 2d 444, cert den 351 U S 988, 100 L Ed 1501, 76 S Ct 1051.

While the *Santosky v. Kramer* decision concerned a parental rights termination procedure rather than a "dependency" divestiture as in the instant case, this court's commentaries therein respecting the magnitude of the parental interest placed at risk by the child custody proceeding and "standard of proof" inequities are every bit as warranted here as in Santosky.

> "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state. Even when blood relationships are strained, parents retain a vital interest in preventing the (irretrievable) destruction of their family life. If

anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the state moves to (destroy) weakened familial bonds, it must provide the parents with fundamentally fair procedures . . . "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss."

Lassiter declared it "plain beyond the need for Multiple citation" that a natural parent's desire for and right to "the companionship, care, custody, and management of his or her children" is an interest far more precious than any property right . . . (*Lassiter v. Department of Social Services*, 452 U.S. 18, (1981)).

The factfinding does not purport – and is not intended – *to balance the child's interest in a normal family home against the parents interest in raising the child.* (Emphasis added) Nor does it purport to determine whether the natural parents or the foster parents would provide the better home. Rather the factfinding hearing pits the state directly against the parents. The State alleges that the natural parents are at fault . . . The State marshalls an array of public resources to prove its case and disprove the parents' case. Victory by the State not only makes (termination) of parental rights possible, it entails a judicial determination that the parents are unfit to raise their own children.

At the factfinding, the State cannot presume that a child and his parents are adversaries . . .

B

The State seeks to establish a series of historical facts about the intensity of its agency's efforts to

reunite the family, the infrequency and insubstantiality of the parents contacts with their child, and the parents' inability or unwillingness to formulate a plan for the child's future . . . *At such a proceeding, numerous factors combine to magnify the risk of erroneous factfinding. (Permanent neglect) Proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge . . . In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent.* (Emphasis added) Because parents subject to (termination) proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.

The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given (termination) proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. *Furthermore, the primary witnesses at the hearing will be the agency's own professional case workers whom the State has empowered both to investigate the family situation to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for (termination).* (Emphasis added)

So closely did Petitioner's experience below resemble Santosky's "predictability" scenario respecting state agency advantage and judicial factfinding leeway, as to suggest a common source. The Agency, in this case, having once acquired judicial custody of the subject child, resisted petitioner's every effort to recover her child, ascribing by way of justification, what it purportedly perceived to be the harmful effect of the discord between the divorced and hostile parents upon the child's best interest and welfare. It ignored moreover, or minimized, at least, the fact that the father's admitted molestation of the child placed such parent beyond any immediate custodial consideration (Appendix "F", pp. 3-4)

Toward proving correction of the transient emotional disorder that had, according to the dependency petition, justified petitioner's initial divestiture of her daughter's custody, petitioner elicited the following testimony from her psychiatrist: (Appendix "F", pp. 3-4)

"By Mr. Gamble:

Q Did you write to Mr. Higgins apprising your opinion of her condition –

A Yes, I did.

Q – and her availability of the custodial care of the child?

A Yes, I did.

Q What was your recommendation to Mr. Higgins in this letter, sir?

A In my assessment, I found there was no emotional or psychiatric reason that I could determine that would prevent April from being – excuse me – that would prevent

> Carol Montenegro from being the best mother that she's possibly able to be for her daughter, April, and I recommended that the daughter be returned to her physical custody.

By Mr. Gamble:

> Thank you sir."

In accordance with the agency case-worker's directive, petitioner continued with psychological counseling following her psychiatric discharge. The conclusive aspect of the trial testimony afforded by petitioner's treating psychologist is as follows: (Appendix "F", pp. 5-6)

> Q All right.
>
> And did Carol at any time tell you about her desire to have the child returned to her custody?
>
> A This was a reasonably constant situation. She very much wanted the child to be returned to her.
>
> Q All right.
>
> Were you able to form an opinion, Doctor, based on your own professionalism and your observation and your counseling with Carol over this period of time, all that you knew about the case, as to whether or not she would be – there would be any reason, based upon her emotional attitude, that would prevent her from functioning as a capable, responsible mother?
>
> A I think she could so function.
>
> Q You think she could?
>
> A Yes."

Cross examination failed to alter or compromise the expressed opinions of either Doctors Petro or Saslow. Dr. Todd Flynn, a psychologist who had assisted Dr. Petro in diagnosing petitioner's ailment during its initial state, testified under cross examination by petitioner's attorney as follows: (Appendix "F", p.7)

> "Doctor. I want (you) to assume for the purpose of my question that Dr. Petro at the time subsequent to Carol Montenegro's discharge from Palo Verde Hospital found her to be well.
>
> MR. TOSCA: That's hearsay, Judge. That's not in evidence at this point.
>
> THE COURT: Dr. Petro testified. Let him finish his question. Go ahead, Mr. Gamble.

BY MR. GAMBLE:

Q After her discharge, at the time of her discharge subsequently thereto, Dr. Petro found Mrs. Montenegro to have recovered from her depressive (dis)order. Would you have any trouble agreeing or accepting this as a probability based on your own pretesting and your own conclusions?

A I have no possible way of confirming or disagreeing with Dr. Petro's assessment, having no knowledge.

Q And then, on the fact (that) you haven't seen Mrs. Montenegro for seventeen or (eighteen) months –

A Since April 29, 1987.

Q Would it not, sir, be reasonably inappropriate from a professional standpoint from a professional standpoint for you to venture an opinion of what her condition would be now without –

A That's correct."

Petitioner's lay witnesses, which included her parents, all testified that petitioner, who had always been a proper and competent mother before being stricken by her recent emotional disorder, had appeared fully and completely recovered following her 2-3 week hospitalization.

The opinion of the Court that prefaced his judgment echoed in essence that testimonial opinion expressed by the child psychologist appointed by the Court to counsel the child and that of the caseworker who had procured the former's appointment. (See Appendix "C")

*The decision of the Court below is in irreconcilable conflict with the due process and fundamental process and fundamental fairness prescriptions of U.S. Const. Amend. XIV.*

The extent to which such judgment and the unchanneled factfinding discretion upon which it posits conflicts with Arizona law is reflected in the following decision of the Arizona Supreme Court enunciated in a dependency proceeding wherein the State Department of Economic Security recommended placing the children in its custody. In affirming the Superior Court's denial of such recommendation, the Supreme Court declared that:

> "No court can transfer a child from its natural parent to any other person for any but the *gravest reasons* (Emphasis added)." It further held that "An award of minor child's custody to a parent thereof is legally presumed to be to the child's best interest" and most cogently observed that "The best of intentions and the greatest zeal to care for neglected, dependent, or delinquent children *do not justify the violation of the constitutional provisions as to due process* that

> are involved in removing a child from the custody of its parent . . . " (Emphasis added) *Arizona State Dep't of Public Welfare v. Barlow* (1956), 80 Ariz. 249, 296 P. 2d 298.

In a similar decision wherein the Arizona Supreme Court reversed the Superior Court's dependency adjudication based, in part, upon allegations challenging the mother's mental stability, the Court said, "I do not think that the legislature intended this section (A.R.S. Section 8-201) to authorize the court to deprive a parent of the custody of his child simply because the parent is suffering from a mental illness, unless that illness causes him to mistreat or neglect the child or renders the home an unfit place, not merely an imperfect place, for the child . . . I do not find in the statute an expression of legislative intent that parents who are devoted to their children should be deprived of their custody because of defects in their own personalities unless those defects have a seriously adverse effect upon the child." *In The Matter Of The Appeal In Pima County Juvenile Action No. J-31853*, (1972) 18 Ariz. App. 219, 501 P. 2d 395.

Petitioner's contention as stated in her Petition For Special Action (Appendix "E", p.7), and subsequent Petition For Review (Appendix "D", p.4) that the judgment of the Superior Court's Juvenile Division denied petitioner due process of law as such is mandated by Amendment XIV of the U.S. Constitution, *Article 2, Section 4 of the Arizona constitution*, and decisional State and Federal law thereto appertaining, posited strongly upon observations of the *Santosky v. Kramer* Court (Id) relative to

factfinding discretion, and the positive declarations of the Arizona Court regarding such process:

> "Discretion in relation to a ruling by trial court excludes arbitrary or unreasonable acts, and means a sound discretion, and an abuse of discretion occurs when the decision is characterized by capriciousness or arbitrariness . . . " *State v. Pierce*, 27 Ariz. App. 403, 555 P. 2d 662; "Judicial discretion is *legal discretion to be exercised in discovering the course of action prescribed by law*.P *Santanello v. Cooper*, 12 Ariz. App. 123, 468 P. 2d 390 (Emphasis added).

A further due process scrutiny presents from the Arizona Supreme Court's holding to the effect that the "Question to be resolved in dependency hearing is not *comparable rights of parents to custody but solely whether child is neglected or dependent.*" *Evans v. Evans* (App. 1977), 116 Ariz. 302, 569 P. 2d 244 (Emphasis supplied), as measured against the Juvenile Court's adjudicatory declaration (See Appendix "C").

## CONCLUSION

The arbitrary adjudication below, in manifest contravention of parental rights protected by U.S. Const. Amend XIV, and the wayward trend it exemplifies respecting state supercession of traditional parental entitlements, warrants this Court's review.

RESPECTFULLY SUBMITTED this 25th day of January, 1990.

PAUL MENKVELD
Attorney at Law
#200, 177 N. Church Ave.
Tucson, Arizona 85701
(602) 628-7777

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4. Petitioner's Petition for Review dated May 30, 1989, petitioning the Arizona Supreme Court's review of the appellate court's refusal to take jurisdiction of Petitioner Special Action Petition.....App. 7

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**APPENDIX "A"**

Supreme Court
State of Arizona
201 West Wing State Capitol
1700 West Washington
Phoenix, Arizona 85007-2866

Telephone: (602) 542-4536

November 1, 1989

RE: CAROL ANN MONTENEGRO vs. SUPERIOR COURT PIMA CO. – HON. STEPHEN M. RUBIN et al
Supreme Court No. CT-89-0239-PR
Court of Appeals No. 2 AC-SA 89-0037
Pima County No. 98452

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 31, 1989, in regard to the above-referenced cause:

ORDERED: Petition for Review – DENIED.

Record returned to the Court of Appeals, Division Two, Tucson, this 1st day of November, 1989.

NOEL K. DESSAINT, Clerk

TO:

Albert R. Gamble, Esq. Presidio Suite, 177 N. Church Avenue, Tucson, AZ 85701

Hon. Robert K. Corbin, Attorney General, 1275 W. Washington, Phoenix, AZ 85007 Attn: Jay W. McEwen, Esq.

Paul F. Tosca, Esq., 434 S. Williams Blvd., Suite 200, Tucson, AZ 85711

Laurel Sammons, Esq., Sammons & Sammons, 800 North Swan Road, Suite 106, Tucson, AZ 85711

Joyce A. Goldsmith, Clerk, Court of Appeals, Division Two, 416 W. Congress, Tucson, AZ 85701

mr

**APPENDIX "B"**

Filed by Clerk
May 18, 1989
Court of Appeals
Division Two

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

May 18, 1989

RE: MONTENEGRO v. SUP. CRT.; and AZ. DEPT. OF ECONOMIC SECURITY, et al.
2 CA-SA 89-0047
PIMA County Superior Court Juvenile Dependency Action No. 98452

The following action was taken by the Court of Appeals for the State of Arizona, Division Two, Department B, on May 16, 1989, in the above-referenced cause:

"ORDERED: The Court declines to accept jurisdiction."

JOYCE A. GOLDSMITH, Clerk

**APPENDIX "C"**

ARIZONA SUPERIOR COURT
PIMA COUNTY

STEPHEN RUBIN
JUDGE PRO TEMPORE

NO.98452

DATE October 19, 1988

IN THE MATTER OF

MONTENEGRO, April

D.O.B. 9/04/81

A MINOR.

MINUTE ENTRY
UNDER ADVISEMENT:

The Court makes the following special findings:

(1) That the minor child is caught in the middle of a custody battle. The results of the battle are that the child is suffering from emotional abuse and neither parent has any insight into the effects of their actions on the child.

(2) That the maternal grandparents are at least partially responsible for the child's problems.

(3) That it would be in the best interest of the child to discontinue visits between her and both sets of grandparents until the situation is stabilized.

IT IS ORDERED that the natural mother's Petition for Change of Placement is denied, and the minor shall remain in her present placement.

EXHIBIT F

18-52a (6/25)

Nora Douglas
Deputy Clerk

MINUTE ENTRY

Page No. 2

Case No. 98452

Date October 19, 1988

IT IS FURTHER ORDERED that grandparents', both maternal and paternal, visitation rights are terminated. The visitation and therapy schedules with the minor and her parents are to be maintained.

IT IS FURTHER ORDERED that the father shall undergo a complete psychological evaluation to be performed by Dr. Phillip Balch.

IT IS FURTHER ORDERED that the father engage in whatever remedial therapy Dr. Balch believes to be indicated.

IT IS FURTHER ORDERED that all prior orders of the Court remain in full force and effect.

IT IS FURTHER ORDERED that a Review of Dependency be set for January 16, 1989 at 10:00 a.m. before this Referee.

DATED THIS 27 DAY OF OCTOBER, 1988

JUDGE PRO TEMPORE

Copies to:

CRT
Social File
D.E.S. (J. Higgins)
A.S.A.G. (J. McEwen)

F.C.R.B.
Albert Gamble, Esq., 177 N. Church (01)
Laurel Sammons, Esq.,
Paul Tosca, Esq., 434 S. Williams Blvd. Ste. 200(11)

Mailed
10-31-1988

Nora Douglas
Deputy Clerk

/8-/8/

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**APPENDIX "D"**

ALBERT R. GAMBLE, ESQ.
Presidio Suite
177 N. Church Avenue
Tucson, Arizona 85701
(602) 628-7777
PCC No. 19840
Attorney for Petitioner

FILED
ARIZONA
COURT OF
APPEALS
DIV. TWO

May 30
4:12 pm '89
Joyce A.
Goldsmith
Clerk

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | |
|---|---|
| CAROL ANN MONTENEGRO,<br>Petitioner,<br>vs.<br>HONORABLE STEPHEN M. RUBIN, Judge Pro Tempore, Arizona Superior Court, Pima County.<br>Respondent,<br>and<br>ARIZONA DEPARTMENT OF ECONOMIC SECURITY; RALPH B. MONTENEGRO, JR.; A MINOR,<br>Real Parties in Interest. | NO.2 CA-SA 89-0037<br><br>PETITION FOR REVIEW |

Pursuant to provisions of Rule 23, Arizona Rules of Civil Appellate Procedure, applicant respectfully petitions the Supreme Court of Arizona to review the order of the Arizona Court of Appeals made and entered in the above entitled cause on May 18, 1989, whereby it declined to accept jurisdiction of petitioner's application for Special Action relief from a judgment of the Superior Court of Arizona. A copy of the subject order is hereto attached and incorporated by this reference.

A. SYNOPSIS OF THE COURT OF APPEAL'S DECISION.

(1) The Court of Appeals specifies no basis for its refusal to accept jurisdiction.

B. ISSUES PRESENTED FOR REVIEW.

Additionally to the Appellate Court's unspecific refusal to accept jurisdiction, notwithstanding the petition's prima facie showing of justification, petitioner contends the following issues to be reviewable:

(1) The adequacy of Arizona's statutory, decisional and procedural law safeguarding the fundamental right of parents to have the care, custody and management of their children, vis-a-vis the state's power to interfere with such relationship.

(2) The legal criteria controlling the fact-finding tribunal's discretionary powers as governed by the evidence adduced during trial and the law of the case.

(3) Whether the Court abused its discretion in ruling against petitioner's O.S.C. Motion in

face of the fitness showing made by said applicant.

C. FACTS MATERIAL TO A CONSIDERATION OF ISSUES PRESENTED.

(1) The facts relied upon by petitioner are detailed in full and at length in her Petition For Special Action (App. pp. 1-10) and accompanying Motion and Memorandum for an Order to Show Cause (App. pp. 11-20).

D. REASON WHY THE PETITION SHOULD BE GRANTED

(1) Petitioner's main grievance is one best known to mothers driven by instinct, and the devastating exigencies of such circumstance, to try, at least, to protect their minor children from the carnal assaults of pathological fathers – a societal evil that appears to be reaching epidemic proportions, according to news media accounts. She ascribes her protested deprivation to the D.E.S. caseworker's obliquity towards every showing made of her parental fitness, and incomprehensible determination to favor the abusive father's side of the resulting custody stand-off between the child's divorced and alienated parents, even while conceding the father's present, and most probable future unfitness

(2) The court's unqualified endorsement of the department's clearly partisan recommendations left the mother without real hope of ever winning that agency's approval of her custodial claim, considering its requirement that she reestablish familial accord with the abusive father for the supposed sake of the child's emotional well being (App. p. 18).

(3) The mother-petitioner's appeal from the Juvenile Court's denial of her O.S.C. Application for placement custody of her child was rejected by the Court of Appeals on jurisdictional grounds (App. p.5) following which the Supreme Court disallowed her Petition For Review. It must appear manifest, however, that appeal would not have provided such appellant the plain, speedy and adequate remedy from the protested judgement contemplated by the Special Action's rule considering the urgent, ongoing and aggravated nature of her grievance; hence her instant petition for Special Action relief.

In addition to the foregoing, petitioner contends that important issues of law respecting fundamental parental rights have either been incorrectly decided, or inadequately defined to safeguard such rights in accordance with due process strictures; that the discretionary abuses complained of by petitioner derived, in substantial part, from such conflicts and that the instant petition should be granted to allow the Supreme Court's review and correction of such defects.

DATED this 30th day of May, 1989.

ALBERT R. GAMBLE
200 Transamerica Building
177 North Church Avenue
Tucson, Arizona 85701
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

Authority for the instant petition is contained in Rule 23, R. Civ. App. Proc. The principal points and authorities

relied upon by petitioner are set forth at length in the memorandum incorporated within the Motion for an Order To Show Cause filed with her petition (App. pp. 11-20).

Petitioner will submit additional Points and Authorities at the court's request.

RESPECTFULLY SUBMITTED this 30th day of May, 1989.

ALBERT R. GAMBLE
200 Transamerica Building
177 North Church Avenue
Tucson, Arizona 85701
Attorney for Petitioner

Copy of the foregoing
Petition For Review
mailed this 30th day
of May, 1989, to:

PAUL F. TOSCA, JR.
Attorney at Law
434 S. Williams Blvd., Suite 200
Tucson, Arizona 85711

SAMMONS & SAMMONS
Laurel B. Sammons, Esq.
800 North Swan Rd., Suite 106
Tucson, Arizona 85711

Hon. Robert K. Corbin
Attorney General
Jay W. McEwen, Esq.
Assistant Attorney General
402 W. Congress, #315
Tucson, Arizona 85701

**APPENDIX "E"**

ALBERT R. GAMBLE, ESQ.
Presidio Suite
177 N. Church Avenue
Tucson, Arizona 85701
(602) 628-7777
PCC No. 19840
Attorney for Petitioner

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

| | |
|---|---|
| CAROL ANN MONTENEGRO,<br>Petitioner,<br>vs.<br>HONORABLE STEPHEN M. RUBIN, Judge Pro Tempore, ARIZONA DEPARTMENT OF ECONOMIC SECURITY; RALPH B. MONTENEGRO, JR., and APRIL MONTENEGRO, A Minor.<br>Respondents. | NO.2 CA-SA 89-0037<br><br>PETITION FOR SPECIAL ACTION |

The above named petitioner, CAROL ANN MONTENEGRO, herein applies, pursuant to Arizona Rules of Procedure For Special Actions, for this Court's review of an order of respondent, HONORABLE STEPHEN M. RUBIN, Judge Tempore of the Arizona Superior Court, Juvenile Division, sitting at Pima County, made and entered on October 27, 1988, in Dependency Action No. 98452 of said court entitled; In the Matter of April Montenegro, A Person Under The Age of Eighteen Years,

under which order said respondent denied the natural mother's application for an Order To Show Cause why she should not be granted immediate custody of her child. In support of this application petitioner states the following:

(1) Petitioner is a resident of the State of Arizona, has resided at 1150 East Irvington, Tucson, Arizona, for the better part of two years, last past, and is the natural mother of the child named in the Dependency proceedings previously designated herein.

(2) The respondent, STEPHEN M. RUBIN is and was at all times relevant hereto, a judge pro tempore of the Superior Court of Arizona, Juvenile Division, sitting at Pima County, Arizona.

(3) The respondent, ARIZONA DEPARTMENT OF ECONOMIC SECURITY is, and has been since March 3, 1988, custodial guardian of APRIL MONTENEGRO, the minor named in, and subject of the Dependency proceedings previously designated herein.

(4) The respondent, RALPH B. MONTENEGRO, JR., is a resident of Pima County, Arizona, former spouse of petitioner and natural father of the minor subject of the Dependency proceedings previously designated herein.

(5) APRIL MONTENEGRO, D.O.B. 9/4/81, designated a respondent herein, is the minor child named in the Dependency proceedings to which the instant proceeding relate.

(6) The former marriage between this petitioner and the respondent, RALPH B. MONTENEGRO, JR., was dissolved on March 28, 1988, by a decree of dissolution

made and entered by the Arizona Superior Court, Pima County division, in case No. D-64867 of that tribunal wherein this petitioner was petitioner, and RALPH B. MONTENEGRO, JR. was respondent.

(7) Shortly following lodgment of her petition for dissolution this petitioner suffered an acute, albeit transient emotional disorder that required her hospitalization for several weeks during which period the Superior Court, in accordance with an unauthorized stipulation signed by petitioner's lawyer, since discharged, awarded petitioner's former spouse, RALPH B. MONTENEGRO, JR., temporary custody of their infant daughter, APRIL, subject only to petitioner's visitational rights. In circumstance of that order which also enjoined petitioner's return to her marital home, pendent lite, petitioner took temporary shelter with her parents following her recovery and dismissal from the hospital. For approximately eight (8) months thereafter, respondent, RALPH MONTENEGRO, JR., transported the child, APRIL, to and from the minor's weekend visits with her mother, at the latter's temporary residence.

(8) On March 3, 1988, in pursuance of information that the child, APRIL, was being sexually molested by her natural father, RALPH B. MONTENEGRO, JR., the respondent, ARIZONA DEPARTMENT OF ECONOMIC SECURITY, acting under authority of A.R.S. 8-223(B)(2)(a) and/or (b), took the child, APRIL, under its protective custody. The Department's informants were Nathan and Verna Flentge, maternal grandparents of APRIL who had regularly assisted their daughter and temporary house

guest, CAROL, in looking after their visiting granddaughter, APRIL. These informants later furnished affidavits to this petitioner's attorney detailing their observations of the natural father's fondlings of the child's sexual parts, which affidavits were incorporated thereafter into the O.S.C. Application of the mother previously mentioned in this petition.

(9) Thereafter, on May 31, 1988, the Juvenile Court, sitting at Pima County, heard and granted the uncontested dependency Petition of the DEPARTMENT OF ECONOMIC SECURITY titled and numbered as previously stated herein, and entered its order finding the protected minor, APRIL MONTENEGRO, to be a dependent child as such condition is defined under A.R.S. 8-201 11(a) and (b).

(10) Petitioner, who had, antecedently to the hearing and adjudication of May 31, 1988, fully recovered from the transient emotional disorder ascribed to her in the State's Dependency petition and upon which said respondent presumed the natural mother's custodial incapacity and of which fact of petitioner's recovery, said respondent, D.E.S., had prior knowledge, attributes her neglect to contest the Dependency petition to inadvertence resulting from the inefficient assistance she received from her former counsel, since replaced. Thereafter, petitioner moved the Juvenile Court for an order upon the DEPARTMENT OF ECONOMIC SECURITY, et al, to show cause why the petitioner, as natural mother of the subject minor, being otherwise fit and eligible in every material respect, should not be awarded the immediate custody, care and management of her minor daughter and the dependency proceedings terminated; or granted, in the

alternative, the immediate physical custody of the child pending the proceeding's termination. Such application is set forth in full in Exhibit 1, which exhibit is attached hereto and by reference incorporated herein.

(11) After hearing duly held upon the natural mother's O.S.C. application, wherein this petitioner adduced through the testimony of both lay and professional witnesses, irrefutable and essentially undisputed proof of her fitness, competency and desire to have, cherish, manage and care for her child, all as shown by the testimonial record of that hearing, the HONORABLE STEPHEN M. RUBIN disallowed petitioner's application. Such judgement and order is set forth in full in Exhibit 2, which exhibit is attached hereto and by reference incorporated herein. Financial straits prohibits petitioner's procurement and attachment of the testimonial transcript referenced above.

(12) Petitioner's timely appeal from the protested judgement and order was disallowed by the Arizona Court of Appeals whose apertinent Order of Dismissal is set forth in full in Exhibit 3, which exhibit is attached hereto and by reference incorporated herein. Petitioner's application for review of the dismissal is presently pending hearing by the Arizona Supreme Court whose interlocutory order denying petitioner's motion for a stay of Juvenile Court proceedings is set forth in full in Exhibit 4, which exhibit is hereto attached and by reference incorporated herein. But notwithstanding the ultimate outcome of such appellate proceedings, they will not, at best, afford petitioner the clear, speedy or adequate remedy from the great harm she has, and will suffer as a result of the protested judgements and orders, absent relief from this court.

(13) Thereafter, on February 21, 1989, and notwithstanding this petitioner's objections or the pendency of her appeal, the HONORABLE STEPHEN M. RUBIN granted the ARIZONA DEPARTMENT OF ECONOMIC SECURITY'S motion for leave to place the subject child in the physical custody of her paternal grandparents, the natural father's parents, denying in the process, petitioner's concurrently renewed application for termination of the dependency proceedings consistently with petitioner's parental rights, entitlements, eligibility and demands, or for its order, in the alternative, placing the child in petitioner's physical custody pending the proceedings' termination. Petitioner's responsive objections to the Department's motion and the protested judgement and order are both set forth in full in Exhibits 5 and 6, which exhibits are attached hereto and by reference incorporated herein.

(14) When granting the State's application to place the child with her paternal grandparents, the HONORABLE STEPHEN M. RUBIN was presumably mindful of the fact of record that the natural father's residence had been with his parents since the termination of his marriage to this petitioner and of the reasonable probability that said party would continue either to reside at, or to have free access to his parents' household following the child's placement there notwithstanding his and his parents open court promises to the contrary. Said respondent was presumably mindful, moreover, of the natural father's psychological instability and propensity to evade the truth as attested by the Court following his examination of RALPH MONTENEGRO, Jr. Such report which is included in the record of the referenced proceedings is set

forth in full in Exhibit 7, which exhibit is attached hereto and by reference incorporated herein.

(15) The Court was further mindful, presumably, of the father's constructive admission through said party's "no contest" election, respecting the State's Dependency Petition, augmented by the unrefuted affidavits of petitioner's parents, hereinabove mentioned, that such parent had indeed molested the subject child and of the reasonable probability that the proven malingerer, whose misbehavior had been, as shown by the testimonial record, further confirmed by his victim under questioning by the Court appointed psychologist, would abuse again given the opportunity that the innocent infant's placement in the malefactor's de facto domicile would provide. Said respondent was presumably mindful, moreover, of the record proof of the natural mother's present fitness to properly manage and care for her daughter and of such parent's understandable concern and anxiety for the safety and welfare of her previously molested child in face of the requested Foster Care Review Board's past recommendation, of record, that the mother be awarded custody of the child. Such recommendation is set forth in full in Exhibit 8, which exhibit is attached hereto and by reference incorporated herein.

(16) Petitioner contends that the judgements and orders of the HONORABLE STEPHEN M. RUBIN herein protested denied petitioner due process of law as such is mandated by Amendment 14 of the United States Constitution, Article 2, Section 4, Constitution of Arizona, and the decisional state and federal law appertaining to such organic prescriptions to the extent that such judgements and orders denied petitioner's fundamental right, under

the circumstances of the case, to the immediate custody, care and management of her natural child in absence of legally sufficient proof of her personal unfitness therefor.

(17) Petitioner further contends that the protested judgements and orders were made and entered arbitrarily, capriciously and amounted to abuses of judicial discretion in that they were posited upon said respondent's subjective whimsies, preferences and conclusions, rather than objective, demonstratable facts of the case and the law applicable. Petitioner states that the protested judgements and orders have, and will, unless reversed or corrected by this court, caused, and will cause petitioner great and irreparable harm in respect of her right and desire to manage, care for and rear her child, to prevent which there is available to petitioner no equally plain, speedy and adequate remedy by way of appeal.

WHEREFORE, petitioner respectfully requests the following judgement and relief:

(1) For an order requiring the Juvenile Court to prepare and submit a full, written transcription of the entire testimony taken in course of the evidentiary hearings related to the protested judgements and orders without cost to petitioner.

(2) For an order staying further proceedings in the Juvenile Court relative to the subject cause, pending this Court's disposition herein.

(3) For this Court's review and reversal of the HONORABLE STEPHEN M. RUBIN'S order of October 27, 1988, denying the natural mother's application for the relief

sought by said party's application of July 15, 1988, for an Order to Show Cause.

(4) For this Court's review and reversal of the HONORABLE STEPHEN M. RUBIN'S order granting the change of placement requested by the ARIZONA DEPARTMENT OF ECONOMIC SECURITY while denying the natural mother the relief sought by her response to said application.

(5) For petitioner's costs and expenses herein incurred, including a reasonable award as and for the fees of her attorney.

(6) For such other and further or alternative relief as the Court may deem to be proper and just in the premises.

DATED this 16 day of March, 1989.

ALBERT R. GAMBLE
200 Transamerica Building
177 North Church Avenue
Tucson, Arizona 85701
Attorney for Petitioner

STATE OF ARIZONA )
) ss.
County of Pima )

CAROL ANN MONTENEGRO, being first duly sworn upon oath, deposes and says as follows:

(1) I am the named petitioner in the foregoing Petition for Special Action entitled CAROL ANN MONTENEGRO, petitioner, versus HONORABLE STEPHEN M. RUBIN, et al, Respondents;

(2) I have read the foregoing petition and know the contents thereof;

(3) The statements and matters therein alleged are true of my own personal knowledge, except as to those matters stated upon information and belief and as to such matters, I believe them to be true.

DATED this 16 day of March, 1989.

CAROL ANN MONTENEGRO

SUBSCRIBED AND SWORN TO before me, the undersigned Notary Public, this 16 day of March, 1989, by Carol Ann Montenegro, by me personally known.

NOTARY PUBLIC

My Commission Expires:
6-27-92

is relating to the issue of sexual molestation, reference the father as a possible perpetrator.

This hearing is basically a request for change of placement for the natural mother. Any allegation of abuse, allegedly made by the father, is irrelevant to this hearing.

MR. GAMBLE: I can't see why it would be irrelevant, Your Honor. Each parent is standing in equally, otherwise entitled to custody of the child. This Court has jurisdiction of the custody matter.

THE COURT: The thing I have the problem with, Mr. Gamble, the record already contains an admission by the natural father and the natural mother to a petition which alleges dependency, and that indicates that Dr. Smith examined the child, that some of Dr. Smith's findings, and the fact that Dr. Smith's opinion was that there was some inappropriate sexual activity, and that she could not rule out penetration in this case; and whether or not your client is appropriate today for the physical placement of the child really has nothing to do with that.

MR. GAMBLE: Well, –

THE COURT: If you want to relitigate it, –

MR. GAMBLE: No, Your Honor.

THE COURT: – I suppose we can do that.

MR. GAMBLE: My own perception of the law, Your Honor, could be faulty, but my own perception of the law is that as between two parents equally, otherwise

equally entitled to physical custody of the child that is temporarily in the custody of the State of Arizona, the Court certainly – and rulings on the question of which parent should have precedence – must take into consideration all of its background circumstances, would have some bearings upon the fitness, or unfitness, of one or both.

If the Court is taking notice and is saying that the Court has notice of the allegations that have been made and the proof already submitted, –

THE COURT: The Court found as a matter of law that the allegations in the amended petition were true.

MR. GAMBLE: Very well, Your Honor. I can get rid of this expert witness without further question.

MR. TOSCA: Judge, just for the record it was an amended petition which my client

A I am.

Q And did that subpoena ask you to bring with you certain records?

A No, in fact, it did not.

Q It did not? My mistake.

But you do – you do know while you're treating Carol Montenegro, did you not, did you learn she was in a custody fight with her former husband over their child?

A Yes, that has been one issue of discussion between she and I in her therapy with me over greater than one year.

Q And did you exchange correspondence with Mr. John Higgins of the Arizona Department of Economic Security regarding Carol's condition?

A Yes, I did.

Q And did you write him, sir, on or about May 16th, 1988, a letter in which you stated to him –

MR. TOSCA: Objection; okay, I withdraw the objection.

THE COURT: Go ahead.

BY MR. GAMBLE:

Q Did you write to Mr. Higgins apprising your opinion of her condition?

A Yes, I did.

Q – and her availability (for) the custodial care of the child?

A Yes, I did.

Q What was your recommendation to Mr. Higgins in this letter, sir?

A I recommended that –

MR. TOSCA: Judge, I have an objection, if he is going to respond to whether she should have custody of this child because that's not why we're here.

THE COURT: He just asked him what was his recommendation. I'd like to hear it.

BY MR. GAMBLE:

A In my assessment, I found there was no emotional or psychiatric reason that I could determine that would prevent April from being – excuse me – that would prevent Carol Montenegro from being the best mother that she's possibly able to be for her daughter, April, and I recommended that the daughter be returned to her physical custody.

MR. GAMBLE: Thank you sir.

to the – her condition at the time of her first visit with you? How would you rate that?

A As I said before, I would see significant improvement as evidenced by some of the matters already mentioned.

Q Based on what you have come to know about the custody battle and all, Doctor, and incidentally, let me rephrase.

You knew, also, that Arizona Department of Economic Security had assumed custody of the child –

A Yes.

Q – in the course of this matter, did you not?

A Yes.

Q All right.

And did Carol at any time tell you about her desire to have the child return to her custody?

A This was a reasonably constant situation. She very much wanted the child to be returned to her.

Q All right.

Were you able to form an opinion, Doctor, based on your own professionalism and your observation and your counseling with Carol over this period of time, all that you knew about the case, as to whether or not she would be – there would be any reason, based upon her emotional attitude, that would prevent her from functioning as a capable, responsible mother?

A I think she could so function.

Q You think she could?

A Yes.

MR. GAMBLE: Cross-examination.

THE COURT: Mr. McEwen.

MR. McEWEN: Yes, briefly.

CROSS-EXAMINATION

BY MR. McEWEN:

Q You indicated, and I'll refer to it specifically, in a letter to Mr. Higgins there was a gap in treatment from December '87 to April of '88, is that correct?

A Yes.

Q What was the reason for that?

A I really don't know.

Q Was she scheduled for regular appointments and simply did not appear?

Doctor. I want to assume for the purpose of my question that Dr. Petro at the time subsequent to Carol Montenegro's discharge from Palo Verde Hospital found her to be well.

MR. TOSCA: That's hearsay, Judge. That's not in evidence at this point.

THE COURT: Dr. Petro testified.

Let him finish his question. Go ahead, Mr. Gamble

BY MR. GAMBLE:

Q After her discharge, at the time of her discharge, subsequently thereto, Dr. Petro found Mrs. Montenegro to have recovered from her depressive order. Would you have any trouble agreeing or accepting this as a probability based on your own pre-testing and your own conclusions?

A I have no possible way of confirming or disagreeing with Dr. Petro's assessment, having no knowledge.

Q And then on that fact you haven't seen Mrs. Montenegro for seventeen or months –

A Since April 29, 1987.

Q Would it not, sir, be reasonably inappropriate from a professional standpoint for you to venture an opinion of what her condition would be now without –

A That's correct.